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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FRANKI BOLORIN AND ROSA RAMOS **PLAINTIFFS** **V.** **DAVID F. BORRINO, AND REINER, REINER & BENDETT, P.C.** **DEFENDANTS.**	**CASE NO.: 3:07CV-02169 JAH-WMC** **RESPONDENTS' OPPOSITION TO CHASE HOME FINANCE LLC'S PETITION TO QUASH DEPOSITION SUBPOENA DUCES TECUM AND REQUEST TO TRANSFER MATTER TO THE DISTRICT OF CONNECTICUT** **HON. WILLIAM C. MCCURINE** **DATE: JAN. 28, 2008** **TIME: 11:00 A.M.** **CRTRM: C**
CHASE HOME FINANCE, LLC. **PETITIONER,** **V.** **FRANKI BOLORIN AND ROSA RAMOS** **RESPONDENTS.**	

ARGUMENT

I. CHASE WAIVED ITS RIGHT TO OBJECT TO THE SUBPOENA ISSUED

A. Petitioner Has Failed to Timely Object and Therefore Waived its Objection

Under F.R.C.P. 45, a recipient of a subpoena may move to quash a subpoena in the court from which the subpoena was issued. *Pamida, Inc. v. E.S. Originals*, *Inc.*, 281 F.3d 726, 729, n.3 (8th Cir. 2002). The motion must be "timely" filed, and should certainly be filed before the subpoena's return date. *First City, Texas-Houston, N.A. v. Rafidain Bank*, 197 F.R.D. 250 (S.D.N.Y. 2000)(objections raised more than one year after respondent held in contempt were waived). Failure to file a motion to quash may constitute a waiver of objections to the subpoena. *In re Flat Glass Antitrust Litigation*, 288 F.3d 83, 90 (3d Cir. 2002). Chase's Petition to Quash a subpoena issued on April 30, 2007, returnable May 15, 2007, was filed Nov. 13, 2007. Chase's Petition should be denied because it is untimely. *In re Motorsports Merch. Antitrust Litig.*, 186 F.R.D. 344, (W.D. Va. 1999) (a motion to quash filed 36 days after corporate representatives became aware of subpoena and two months after it was due is untimely); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F. Supp. 2d 270, 278 (D.D.C. 2002) ("Nor is HCA saved by having filed its motion to quash in the wrong forum a mere three months after the subpoena was due; three months late, while closer, is not timely either"); *In re Ecam Publications, Inc.,* 131 B.R. 556, 558 n.1 (Bankr. S.D.N.Y. 1991) (the word "timely" must be read together with Rule 45(c)(2)(B)'s requirement that objection to a subpoena be made within 14 days). Here, Petitioner was properly served with a deposition subpoena of documents on April 30, 2007 (Petitioner's Motion to Quash, Ex. A). Petitioner failed to timely object to this subpoena until after the date due for production, which was May 15, 2007. Not until November 13, 2007 did Petition file a motion to quash the subpoena, over six (6) months after the date due for the production. There is no excuse for Petitioner's failure to timely take the appropriate action if it believed Respondents' subpoena was objectionable. Based solely on the late filing of Petitioner's Motion to Quash, Petitioner has waived its right to object and therefore its Motion should be denied.

B. The Failure of Chase to Timely Object Was An Implied Waiver

A nonparty's failure to timely make objections to a Rule 45 subpoena duces tecum generally requires the court to find that any objections have been waived. *In re DG Acquisition Corp.,* 151 F.3d 75, 81 (2d Cir. 1998); *Creative Gifts, Inc. v. UFO*, 183 F.R.D. 568, 570 (D. N.M. 1998); *Schwarzer, Tashima & Wagstaffe*, California Practice Guide: Federal Civil Procedure Before Trial, § 11:2293 (2005 rev.); *Moon v. SCP Pool Corp*., 232 F.R.D. 633, 636 (D. Cal. 2005). The fact that Chase did not act for over six months constitutes an implied waiver and therefore its late petition should be denied.

C. Chase Expressly Waived Any Objections

On June 7, 2007, Chase acknowledged its obligation to comply with the subpoena and represented that it would do so. See attached. In reliance thereon, plaintiffs/respondents did not take action to enforce the subpoena during the Connecticut discovery period.

D. Chase's Objections Are Invalid

"As an initial matter, the party who moves to quash a subpoena has the 'burden of persuasion' under Rule 45(c)(3). *Travelers Indem. Co. v. Metropolitan Life Insur. Co.,* 228 F.R.D. 111, 113 (D. Conn. 2005); *Concord Boat Corp.,* 169 F.R.D. at 48; *United States v. IBM*, 83 F.R.D. 97, 104 (S.D. N.Y. 1979)." *Moon v. SCP Pool Corp*., 232 F.R.D. 633, 637 (D. Cal. 2005). Chase has not met this burden.

Contrary to Chase's Petition, par 3(a), Chase was not required to travel; it merely had to mail or email the documents. In any event, this objection was waived as untimely.

E. Chase Waived Any Objections Based on Privilege

Chase waived any objections based on privilege by failing to produce an adequate privilege log and relying simply on conclusory assertions. *See Cunningham v. Connecticut Mut. Life Ins.*, 845 F.Supp. 1403 (S.D.Cal.1994). Since Chase produced no privilege log it simultaneously failed in its burden of persuasion and waived any privilege. Moreover, it is well established that any privilege is strictly limited. *In re Fischel,* 557 F. 2d 209, 212-13 (9th Cir. 1977). Plaintiffs/respondents have taken the position in the underlying litigation that there is no applicable privilege in a routine collection/foreclosure matter.[1]

Since Chase has not complied with the subpoena, the Court should grant to plaintiffs/respondents the relief provided by Fed. R. Civ. P. 45(e), with a purge date 14 days after the Court's decision.

II. Any Ruling on Petitioner's Motion to Quash Should Be Decided by the Court Where This Action is Pending

If for some reason the Court looks past Petitioner's untimely objection, as well as its express representation that it must and would comply, the issue should be resolved by the Court where the underlying action is currently pending.

Respondents properly issued a subpoena to Chase on April 30, 2007 requesting Chase to produce certain documents relevant to the pending litigation in the District Court of Connecticut. Chase is located in the Southern District of California and was properly served here. Petitioner was required to produce documents pursuit to the properly served subpoena on May 15, 2007. Now at this late date, Petitioner seeks to have the subpoena quashed.

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[1] "The privilege question is bound up with issues about the relevance of the requested material, and courts have found it appropriate for the court presiding over the underlying dispute to decide questions of relevance. *See Smithkline Beecham,* 210 F.R.D. at 169 n.7 ("[Transfer of the third-party subpoena dispute] may be particularly appropriate when relevancy of the discovery is a significant issue . . . . The court in which the litigation is pending will be in a better position to decide relevancy issues.") (citations omitted). Additionally, at oral argument the parties indicated that Judge Farnan has already had the opportunity to consider cost sharing questions with respect to discovery. His familiarity with not only the underlying facts but these related questions about privilege and cost sharing that have already arisen make him far better suited to hear this dispute than I. *Cf. In re Welding Rod Prods. Liability Litigation,* 406 F. Supp. 2d 1064, 1067 (N.D. Cal. 2005) (finding that transfer served interests of justice, judicial efficiency, and consistency, especially where the action is complex and the judge in transferee district "readily familiar with the underlying issues" and "has already spent considerable time and effort coordinating the pretrial proceedings")." *Stanziale v. Pepper Hamilton LLP*, 2007 U.S. Dist. LEXIS 11320, 8-9 (S.D.N.Y. 2007).

This action is still pending in the District of Connecticut. The Court in the District of Connecticut is well aware of the procedural and substantive issues surrounding this matter and is in a much better position to make a completely informed ruling on any discovery dispute. In anticipation of the January 28, 2008 hearing in this matter, Respondents respectfully request the Court issue a ruling ordering Petitioner to produce the documents or immediately transfer this discovery dispute to the District of Connecticut where it can properly be ruled upon by the Court hearing all other related matters in this case. The following recitals support transfer so that the Connecticut District Court can determine Chase's petition:

1. Chase's Petition herein recites the underlying lawsuit in the District of Connecticut (Petitioner's Motion, par. 2); that the very documents subject to subpoena herein "are the subject of Plaintiffs' discovery demands to the Reiner firm in the pending action in the District of Connecticut" (Par. 3c); that the "identical privilege and work-product claims have already been asserted by the Reiner Firm in the Connecticut action and are currently under advisement by U.S. Magistrate Judge Donna F. Martinez" (par. 4). See attached order.
2. The Federal Rules of Civil Procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. Requiring Mr. Bolorin and Ms. Ramos to litigate in California the same issues already under advisement in Connecticut is contrary to those principles.
3. Fed. R. Civ. P. 45(c)(3)(A) and (B) allows the Court to modify the subpoena upon timely application. Generally, modification of a subpoena is preferable to

quashing it outright. *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004)

4. Transferring the Petition to Quash is within the Court's power to modify. Several courts have either transferred disputes concerning nonparty subpoenas to the district possessing the underlying action or commented on the appropriateness of doing so. See *In re Digital Equip. Corp.*, 949 F.2d 228, 231 (8th Cir. 1991) (court that issued Rule 45 subpoena may remit consideration of objections to court where underlying case is pending); *Petersen v. Douglas County Bank & Trust Co.*, 940 F.2d 1389, 1391 (10th Cir. 1991) (magistrate judge's *sua sponte* transfer of motion to quash nonparty subpoena was proper) ("The absence of any language in Rule 45(d) prohibiting transfer of a motion to quash, coupled with this permissive language [in Rule 26] regarding transfer of motions for protective orders which refers to Rule 45 deponents as well as to parties, is enough to validate the [transfer] action of the Kansas magistrate") (citation omitted); *United States v. Star Scientific,* 205 F. Supp. 2d 482 (D. Md. 2002) (transferring motion to compel nonparty to comply with subpoena to district in which the underlying action was going forward); *Smithkline Beecham Corp. v. Synthon Pharms., Ltd.*, 210 F.R.D. 163, 169 n.7 (M.D. N.C. 2002) ("The third-party subpoena route has the added benefit of allowing the court in which the main litigation is pending to make the ruling."); *Devlin v. Transportation Communs. Int'l Union*, 2000 U.S. Dist. LEXIS 2441, 2000 WL 249286, at *1 (S.D.N.Y. Mar. 6, 2000) (Francis, M.J.) ("There is substantial support in the caselaw, among the commentators, and in the Advisory Committee Note to Rule 26(c) of the Federal Rules of Civil Procedure for the proposition that the court from which a subpoena has issued has the authority to transfer any motion to quash or for a protective order to the court in which the action is pending."), all cited in *Stanziale v. Pepper Hamilton LLP*, 2007 U.S.

Dist. LEXIS 11320, 8-9 (S.D.N.Y. 2007).[2] *See also In re Orthopedic Bone Screw Prods. Liab. Litig.*, 79 F.3d 46, 48 (7th Cir. 1996) (district judges “possess discretion to defer to the judge handling the case on the merits”).

5. Transferring the petition would prevent duplication of effort and inconsistent results. Compare *Atlantic Coastline R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 295, 26 L. Ed. 2d 234, 90 S. Ct. 1739 (1970) (litigants who engage in forum-shopping have the potential "to seriously impair the federal court's flexibility and authority to decide [the underlying] case").
6. Transferring would not adversely affect Chase, who was reported to the Connecticut court to be acting at the behest of a Connecticut attorney (David Atkins at Tyler Cooper). See e-mail attached.

CONCLUSION

By waiting over six months to object to Respondents’ subpoena, Chase waived any right to object. In the event that the Court does not transfer this matter to the originating Connecticut court, Plaintiffs/Respondents respectfully request the Court to deny Chase’s petition and instead hold Chase in contempt for failure to comply with its obligation to provide the documents subpoenaed.

Dated: January 11, 2008

Hyde & Swigart

By: _/s/ Joshua B. Swigart_____
Joshua B. Swigart
Attorneys for Respondents
